that they must have acquired a right given to them by International Enterprise to give the contract to a third party, and this prior requirement had not been met. In the circumstances the dual capacity in which Ho Choo signed first as Chairman of International Trade Exhibition Enterprise and as Managing Director of Kee Nam could have no significance. As far as the plaintiff's offer was concerned, the acceptance was by Ho Choo as Chairman of International Trade Exhibition, which he undoubtedly was. Ho Choo was therefore sued correctly and in his proper capacity, as was Tan Yoke Kim the first defendant.

The appeal before us was made on several grounds the essence of which was that the learned judge ought to have held that there were issues of fact and law to be tried so that the defendants should have been granted leave to defend. In our judgment there were no triable issues in the case. We did not think there could be any dispute as to what the proper contract was. That contract was between the plaintiff and the defendant firm. It was a contract which came into operation by the plaintiff making an offer and the defendant firm accepting it. The plaintiff did his work under that contract. In relation to the amount which he claimed for the work done, a substantial sum had been paid by the defendants who had also issued three cheques. It was true that they were cash cheques and not cheques made out in the name of the plaintiff but they were delivered to him and they were produced by him. In the circumstances, as was pointed out by the learned judge when he dealt with the appeal, the defence was obviously a subterfuge.

After the decision of the Senior Assistant Registrar was made the defendants filed a statement of defence in which they raised the additional issue of faulty construction. The learned judge was not confident whether this issue was properly before him but he expressed the opinion that it did not in any event inspire any idea that such an after-thought raised a triable issue. We entirely agreed with that opinion of the learned judge.

We therefore dismissed the appeal with costs.

Appeal dismissed.

Solicitors: *Dato' S.P. Seenivasagam & Co.; Chung & Huang.*

NON-METALLIC MINERAL PRODUCTS MANUFACTURING EMPLOYEES UNION & ORS. v. SOUTH EAST ASIA FIRE BRICKS SDN. BHD.

[F.C. (Gill C.J. (Malaya), Ong Hock Sim and Raja Azlan Shah F.JJ.) April 14, 1976]

[Kuala Lumpur — Federal Court Civil Appeal No. 87 of 1975]

Industrial Law — Strike — Whether legal — Whether workmen have broken their contract of employment by going on strike — Rights of trade union — Industrial Relations Act, 1967, s. 12(7) — Employment Ordinance, 1955, ss. 8 and 15(2).

Administrative law — Application for certiorari — Jurisdiction of High Court — Findings of fact by Industrial Court — Whether strike legal — Whether workmen have broken their contract of service by going on strike — No error of law in findings of Industrial Court.

This was an appeal from the decision of Abdul Hamid J. ([1975] 2 M.L.J. 250). On February 4, 1974, 73 workers of the company stopped work and went on strike. The apparent cause of the strike was that the management of the company had repeatedly ignored the requests of the trade union for recognition and to commence negotiation for collective bargaining of terms and conditions of employment. The stoppage of work ended on February 16 when the dispute was referred to the Industrial Court on February 12, 1974. In the meantime the management had issued two warning notices to the strikers that the stoppage of work was a sudden wildcat strike and was illegal and a break in service and unless they returned to work within 48 hours their services would be deemed to be terminated. When the members reported for duty again on February 16, 1974, the company refused to accept them. The Industrial Court found that the workers by going on strike did not terminate their contracts of service; that the company in refusing to reinstate them had declared a lock-out and that the strike was legal. It therefore made an award that the workmen be reinstated on the same terms and conditions of employment with effect from February 16, 1974. The company applied to the High Court for an order of *certiorari* to quash the decision of the Industrial Court contending that the Industrial Court had erred in law in coming to the findings it did. The learned judge upheld the company's application and quashed the award. The trade union appealed to the Federal Court.

Held, allowing the appeal: (1) the circumstances under which the High Court can interfere with the decision of the Industrial Court are limited. For instance, it has no jurisdiction to interfere with the findings of fact reached by the Industrial Court on the ground that the decision is erroneous except where there is a clear error of law on the face of the record;

(2) section 8 of the Employment Ordinance, 1955, has removed the provisions of section 15(2) of the Employment Ordinance from the scene of trade disputes. That provision can be safely overlooked when dealing with the activities of a registered trade union, as such activities for instance a strike in contemplation or in furtherance of a trade dispute are protected;

(3) all the necessary ingredients of the definition of strike existed in the present case and the stoppage of work on February 4, 1974 amounted to a strike. The Industrial Court was not in error in finding that the workmen had gone on strike and that the strike was legal;

(4) the Industrial Court was also not in error in holding that the company in refusing to reinstate the workmen had declared a lock-out;

(5) workmen are entitled to withdraw their labour by concerted action for any lawful purpose connected with management. Workmen who down tools do not risk the loss of their employment. The contracts of service are suspended by the strike, they are not terminated and the workmen are entitled to be put back to the *status quo* on the same terms and conditions;

(6) the company could not by issuing the warning notices and thereby imposing a new term of service convert the absence from work of the workmen who had gone on strike into abandonment of their contracts of service.

Cases referred to:-

(1) *Wong Mook* v. *Wong Yin & Ors.* [1948] M.L.J. 41.

(2) *Crofter Hand Woven Harris Tweed Company Limited & Ors.* v. *Veitch & Anor.* [1942] A.C. 435, 463.

(3) *Conway* v. *Wade* [1909] A.C. 506, 513.

(4) *Rookes* v. *Barnard* [1964] 1 All E.R. 367, 381.

FEDERAL COURT.

D. P. Xavier (*G. Vadiveloo* with him) for the appellants.

Ronald Khoo (*V. T. Nathan* with him) for the respondents.

Raja Azlan Shah F.J.: This appeal is directed against the judgment of the High Court reported in [1975] 2 M.L.J. 250 setting aside the award of the Industrial Court made on August 8, 1974. The parties

to the dispute are the South East Asia Fire Bricks Sdn. Bhd. ("the company") and the Non-Metallic Mineral Products Manufacturing Employees Union ("the union") and its members.

The relevant facts and circumstances giving rise to the appeal are set forth in the judgment. On February 4, 1974, 73 workers of the company stopped work. The stoppage ended on February 16, 1974 when the dispute was referred to the Industrial Court on February 12, 1974. They resolved to resume work on that day, i.e. February 16, but were locked-out. The apparent cause for the strike was that the management of the company had repeatedly ignored the requests for recognition and to commence negotiation for collective bargaining of terms and conditions of employment. The strike ballot was taken on February 3, 1974. On February 4 and 5 the management issued two warning notices to the strikers that the stoppage of work was a sudden wild-cat strike and was illegal and a break in service, and unless they returned to work within 48 hours their services would be deemed to have terminated.

It appears to me clear from the evidence, and, indeed, it cannot seriously be disputed that there was a trade dispute. Section 12(7) of the Industrial Relations Act, 1967, reads:

"If after such steps, as aforesaid, have been taken, there is still refusal to commence collective bargaining, a trade dispute shall be deemed to exist upon the matters set out in the invitation."

The Industrial Court found that the workers, by going on strike, did not terminate their contracts of service; that the company in refusing to reinstate them had declared a lock-out; and that the strike was legal. It therefore made an award that the workmen were to be reinstated on the same terms and conditions of employment with effect from February 16, 1974.

The company took the matter to the High Court contending that the Industrial Court had erred in law in coming to those findings. The learned judge upheld the company's application and quashed the award. Hence this appeal by the union.

The learned judge's formulation that "certiorari is pre-eminently a special revisionary discretionary remedy to be acted upon recognised and established principles" is an accurate distillation of the authorities. For my part I would like to express it this way. Proceedings by way of certiorari with regard to industrial disputes are not as of right otherwise they may materially affect the fundamental basis of the decision of the Industrial Court under the Industrial Relations Act, 1967, namely, quicker solution to industrial dispute to achieve industrial peace. The Act is intended to be a self-contained one. It seeks to achieve social justice on the basis of collective bargaining, conciliation and arbitration. Awards are given in circumstances peculiar to each dispute and the Industrial Court is to a large extent free from the restrictions and technical considerations imposed on ordinary courts. The jurisdiction of the High Court to issue orders of certiorari is neither an appellate nor a revisional jurisdiction. Also from the very nature of the power conferred under section 25 of the Courts of Judicature Act, 1964, it is clear that in exercise of this power the High Court exercised original jurisdiction. This jurisdiction stems from the prerogative jurisdiction inherited from the United Kingdom courts and its object is mainly to enable the superior courts to keep inferior tribunals within the bounds of their authority. The supervisionary character is essential for always in the background there is the beguiling illusion that an inferior tribunal entrusted to hand down awards of a final nature may hand down awards as it likes. Therefore the jurisdiction may for convenience be described as an extraordinary original jurisdiction. The circumstances under which the High Court can interfere with the decision of the Industrial Court are limited. For instance, it has no jurisdiction under section 25 of the Courts of Judicature Act to interfere with the findings of fact reached by the Industrial Court on the ground that the decision is erroneous except where there is a clear error of law on the face of the record. It cannot arrogate the powers of a Court of Appeal by substituting its own judgment for that of the Industrial Court on questions of fact and cannot review the evidence.

Before dealing with the facts of this appeal, it is convenient to dispose of a point given a prominent place in the judgment of the High Court. The learned judge considered *Wong Mook* v. *Wong Yin & Ors.*[1] as not outdated and might be distinguished from the instant case. That case, in my mind, concerns the interpretation of the Labour Code — Cap. 154 only, in particular, section 53(iv)(a), regarding the breach of contracts of employment of 4 rubber tappers "along with other tappers" who of their own volition absented themselves for 3 continuous days for the purpose of a strike. Willan C.J. found the element of reasonable excuse not present. He instanced illness and transport breakdown as two ready examples of reasonable excuse. My only comment is that the circumstances of that case are distinguished by one very important fact, that is, the strike was organised by an amorphous group of rubber tappers. In that context the learned Chief Justice was right when he took the view that the provisions of the Trade Union Enactment, 1940 was not affected; hence his pronouncement of section 20 of the Enactment that "a person going on strike, even though the strike is not an illegal one, may break his contract of employment" is, with respect, quite unnecessary to the decision, and is considered obiter. No guidance is more misleading than an obiter dictum.

The learned judge rightly held in the instant case that *Wong Mook* v. *Wong Yin & Ors., supra,* can be justified on the facts. Up to that point I am in complete agreement. A decided case is only an authority for the principle of law that it decides and courts are forever emphasising the individuality of each case. But the learned judge went on to say that section 66(1)(b) of the Trade Union Ordinance, 1959 operates and in the result he has to examine the effect of section 15(2) of the Employment Ordinance, 1955. I think he missed a point there. After rightly distinguishing *Wong Mook* v. *Wong Yin,* he adopted the same line of reasoning as that of Willian C.J., in that case. That is not right. The law has not been standing still since then. A new section, *i.e.,* section 8, has been added to the Ordinance. The relevant section reads:

"8. Nothing in any contract of service shall in any manner restrict the right of any labourer who is a party to such contract —

(b) to participate in the activities of a registered trade union, whether as an officer of such union or otherwise."

In interpreting a statute it is necessary to consider what the law was before the statute was passed, what the mischief was for which the previous law did not provide, and the remedy provided by the statute to correct that mischief. It is here that the learned judge went wrong. He has failed to give proper consideration to the provisions of that section which, in my opinion, is a saving clause for workmen. Workers' organisations cannot exist, if workers are not free to join them, to work for them and to remain in them. This is a fundamental right which is enshrined in our Constitution and which expresses the aspirations of workmen. It is declaratory of present day industrial relations that management should encourage workmen to join a union and to play an active part in its work, but this is restricted to the activities of a registered trade union, such as the freedom to strike. "The right of workmen to strike is an essential element in the principle of collective bargaining" *per* Lord Wright in *Crofter Hand Woven Harris Tweed Company, Limited & Ors.* v. *Veitch & Anor.*[2]. That is a truism. There can be no equilibrium in industrial relations today without the freedom to strike. If workers could not, in the last resort, collectively withhold their labour, they could not bargain collectively.

In this country the freedom to strike appears in the form of immunities from criminal prosecution and from civil action with labour relations and transformed them into privileges which are confined to acts done in contemplation or in furtherance of trade disputes (see section 21 of the Trade Union Ordinance, 1959). However, a strike can be illegal because of the purpose of the strike, e.g., better wages and conditions, recognition dispute, closed-shop dispute, sympathetic strike, or because of the method used, e.g., attacks on person or property, or defamation or trespass (see sections 40 and 41 of the Industrial Relations Act, 1967). In short, what I wish to stress here is that section 8 of the Employment Ordinance, 1955 has removed the provisions of section 15(2) of the Employment Ordinance from the scene of trade disputes. We can safely overlook that provision when dealing with the activities of a registered trade union, such as a strike in contemplation or in furtherance of a trade dispute and is therefore protected.

With these considerations, I now approach this appeal which may conveniently be divided under two heads. The first and root question is to consider the Industrial Court's finding that there was a lawful strike, i.e., a concerted stoppage of work by the workmen employed in an industry. That is a question of fact (see *Conway* v. *Wade*).[3] The Industrial Court found that the workmen had in fact gone on strike, and furthermore that its manifest purpose was to further their trade dispute in regard to union recognition and collective bargaining. That tribunal was charged with findings of fact, and, unless it can be shown that the evidence was so much one way that no reasonable tribunal could have disregarded it, it is not possible to interfere with its finding of fact. In my opinion, all the necessary ingredients of the definition of strike exist in the present case and the stoppage of work on February 4, 1974 amounted to a strike. This was not a case of an individual worker's failure to turn up for work as was decided in *Wong Mook* v. *Wong Yin*, but a concerted action on the part of a large number of workmen. The Industrial Court was not in error in regarding it as a strike that was perfectly legal. A trade union's primary object is to negotiate terms and conditions of service of its members and a dispute as to whether the management should recognise for this purpose is clearly connected with such terms. That can hardly be regarded as an unlawful purpose. Following that, was the Industrial Court right in arriving at the conclusion that the workmen, by going on strike, had not terminated their contracts of service? In my opinion, when workmen absented themselves from work because they had gone on strike with the specific object of enforcing the acceptance of their demands, they could not be deemed to have terminated their contracts of service. By going on strike they clearly indicated that they wanted to continue in their service but were only demanding collective bargaining. Such an attitude, far from evidencing termination of service, emphasises the fact that the service continued as far as they were concerned. There is a preponderance of authority in favour of this view. I need only quote a passage from the speech of Lord Evershed in *Rookes* v. *Barnard*:[4]

"It has long been recognised that strike action or threats of strike action in the case of a trade dispute do not involve any wrongful action on the part of workmen, whose service contracts are not regarded as being or intended to be thereby terminated."

Apart from the apparent "sin" of going on strike, I do not think that there is a *prima facie* case of breach of contracts of service. If there is, only then can the company resort to dismissal action. I say it for this reason. There is a manifest distinction between a collective agreement and a contract of service. A workman cannot, but an employer can, be a party to a collective agreement (see section 12 of the Industrial Relations Act, 1967). The individual workman has no bargaining power in industrial relations. He can never enter into a collective agreement, nor can any number of workmen who do not form an association. It follows that a trade union of workmen, when bargaining collectively, acts always and exclusively as a principal and not as agent for its members, and this has consequences both as regards the effect of the agreement on the contracts of service, and in connection with the law governing trade disputes and trade sanctions. The obligations a union undertakes and the rights it acquires are collective by nature; they cannot be performed by an individual workman. The agreement itself imposes no obligations on union members, and an illegal strike is not a breach by the workmen, of the agreement; it may of course be a breach by the union. Nor can an individual member of the union derive any rights from the agreement as such, as distinguished from his contract of service the content of which has been determined by the collective agreement.

If the decision of the learned judge is correct, then it would have ominous repercussions for trade unions in regard to freedom to strike.

The second and last consideration is whether the Industrial Court's finding that the company, in refusing to reinstate the workmen, had declared a lock-out. It appears to me that if the management took this action with the knowledge or reasonable expectation that the workmen would be willing to return to work on February 16, 1974 and carry out their working obligations, then its act might in certain circumstances constitute a lock-out. It is necessary to look at the situation on that day, not with the benefit of hindsight, but in the light of the situation then prevailing. On February 12, 1974 the Minister had indicated his intention to refer the trade dispute to the Industrial Court. Both the management and the union were notified of the Minister's intervention. The union on receipt of that communication had instructed its members to call off the strike and return for work on February 16, 1974. They reported for work on that day but the management refused to take them back. It therefore seems to me clear that on that day the workmen had no longer wished to withdraw their labour and wanted to go back to work. They had, in my view, clearly ceased to be on strike and the management knew it was no longer under strike pressure. The inference is that it could reasonably expect that the workmen would be ready and willing to resume work. I therefore see no ground for setting aside the Industrial Court's finding that there was a lock-out: on the contrary, I would have been very much surprised if it had been the other way.

I say it again that workmen are entitled to withdraw their labour by concerted action for any lawful purpose connected with management. Workmen who down tools do not risk the loss of their employment. The contracts of service are suspended by the strike, they are not terminated, and the workmen are entitled to be put back to the status quo on the same terms and conditions. Much had been canvassed in the court below and before us to the two warning notices given by the company indicating that if the workmen did not return to work by a certain date, they would be deemed to have abandoned their contracts of service. In my opinion, the management could not, by imposing a new term of service, unilaterally convert the absence from work of the workmen who had gone on strike into abandonment of their contracts of service.

I would allow the appeal with costs to the appellants both here and in the court below, setting aside the order of the High Court and restoring the award of the Industrial Court.

Gill C.J. (Malaya) and **Ong Hock Sim F.J.** concurred.

Appeal allowed.

Solicitors: *Xavier & Vadiveloo; Shearn Delamore & Co.*

KHOR KUEK JIN v. HAJI YASIN & ORS.

[F.C. (Gill C.J. (Malaya), Ali and Raja Azlan Shah F.JJ.) April 16, 1976]

[Penang — Federal Court Civil Appeal No. 76 of 1975]

Equity and Trusts — Constructive trust — Money had and received to the use of the claimants — Whether claim barred by limitation.

This was an appeal from the decision of Arulanandom J. who ordered the appellant to pay to the respondents a sum of $59,040 which he had received from the State Government as compensation on acquisition of part of the land which he had sold to a buyer who had in turn sold it to the respondents.

Held, dismissing the appeal: (1) the learned trial judge was right in holding that the appellant was in fact a constructive trustee of the money which had been paid to him on behalf of the purchasers;

(2) the money paid to the appellant could be recovered from him as money had and received by him to the use of the respondents;

(3) the claim was not statute barred, as the respondents did not know until 1970 that the money had been paid to the appellant.

Case referred to:-

(1) *Soar* v. *Ashwell* [1893] 2 Q.B. 390, 400.

FEDERAL COURT.

Lim Ewe Hock (*V. Veerappan* with him) for the appellant.

G. Moganasundram for the respondents.

Gill C.J. (Malaya) (delivering the judgment of the Court): This was an appeal from a judgment of Arulanandom J. whereby the appellant as second defendant in the action was ordered to pay to the respondents as plaintiffs a sum of $59,040 which he had received from the State Government of Penang as compensation on acquisition of a part of the land which he had sold to the first defendant and which the first defendant in turn had sold to the plaintiffs.

The facts of the case very briefly were that under an Indenture dated July 2, 1958, which was registered in the Registry of Deeds, Penang on August 14, 1958, the plaintiffs and two other persons purchased from the first defendant approximately 213.4 acres of land out of a large piece of land comprised in statutory grant No. 18892 for Lot 287(1) Mukim II in the southern District of Province Wellesley. The first defendant had bought the said 213.4 acres of land from the second defendant and two others under an Indenture dated July 5, 1957.

In 1956 the second defendant had agreed to surrender free to the Government approximately 662 acres of land out of Lot 287(1) and some other Lots for the Nibong Tebal Drainage Scheme. In or about July 1964 the Government took steps to acquire a further area of 171.82 acres out of those lots so as to provide for a total area of 833.82 acres for the scheme. In respect of the acquisition of the area required by the Government for the scheme the Collector of Land Revenue, Nibong Tebal held an inquiry, being Inquiry No. 12/64(2) on February 25, 1965. The second defendant gave evidence at the inquiry for himself and on behalf of his co-owners of the various lots under which the lands to be acquired were held. What he said in his evidence was this. Out of the